

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

<i>DAVID ANDREWS, et al.,</i>)	
)	
<i>Plaintiffs</i>)	
)	
<i>v.</i>)	<i>Docket No. 98-436-P-H</i>
)	
<i>EMERALD GREEN PENSION FUND,</i>)	
<i>et al.,</i>)	
)	
<i>Defendants</i>)	

**RECOMMENDED DECISION ON PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT AGAINST DEFENDANTS EMERALD GREEN
PENSION FUND, COMMERCIAL MORTGAGE & ASSOCIATES, INC.,
AND GALEN C. SHAWVER**

The plaintiffs, David Andrews, Raymond St. Laurent and Richard Dingwell, move for summary judgment against defendant Emerald Green Pension Fund (“EGPF”) on Counts VII, VIII and IX of the third amended complaint and against defendants Galen C. Shawver and Commercial Mortgage & Associates, Inc. (“CMA”) on Counts VII, XVI and XVII of the third amended complaint. Motion for Partial Summary Judgment with Respect to the Emerald Green Pension Fund, Galen C. Shawver, and Commercial Mortgage & Associates, Inc. (“Motion”) (Docket No. 81).¹ I recommend that the court deny the motion.

¹ Since the Motion was filed, fourth and fifth amended complaints have been allowed (Docket Nos. 78 & 126) and a motion seeking leave to file a sixth (Docket No. 120) amended complaint has been filed. The counts addressed in the Motion remain the same in all subsequent versions of the complaint.

I. Summary Judgment Standard

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

Motions for summary judgment are also governed by this court’s Local Rule 56.

II. Factual Background

The majority of the allegations in the plaintiffs' statement of material facts concern the actions or omissions of David Cassidy, another defendant. The defendants against whom this motion is brought object, without citation of authority, to the use of requests for admissions directed to Cassidy and his apparent failure to respond to those requests in a timely fashion as the basis for many of the allegations included in the plaintiffs' statement of material facts. Response of Defendants Emerald Green Pension Fund, Galen C. Shawver and Commercial Mortgage & Associates, Inc. to Plaintiffs' Statement of Material Facts, etc. ("Defendants' Responsive SMF") (Docket No. 97) at 1. The defendants' position is correct. *Becerra v. Asher*, 105 F.3d 1042, 1048 (5th Cir. 1997); *Riberglass, Inc. v. Techni-Glass Indus., Inc.*, 811 F.2d 565, 566-67 (11th Cir. 1987). I will not consider in connection with this motion any of the entries in the plaintiffs' statement of material fact based on the alleged admissions of defendant Cassidy.

The statements of material facts submitted by the parties include the following relevant, appropriately supported material facts that are not in dispute.² Beginning in November 1997 Cassidy

²The plaintiffs submitted with their reply memorandum in connection with the instant motion "Plaintiffs' Additional Statement of Material Facts with Respect to Galen C. Shawver, Commercial Mortgage & Associates, and the Emerald Green Pension Fund," attached to Plaintiffs' Reply to Galen C. Shawver, Commercial Mortgage and Associates, Inc., and Emerald Green Pension Fund's Opposition to Motion for Summary Judgment ("Plaintiffs' Reply") (Docket No. 110). This document does not comply with Local Rule 56(d), which limits a reply statement of material facts to admitting, denying or qualifying additional facts properly submitted by a party opposing a motion for summary judgment. The plaintiffs' "additional statement" makes no attempt to respond in any way to the properly submitted Defendants' Additional Statement of Material Facts in Dispute ("Defendants' SMF"), included in Defendants' Responsive SMF. Accordingly, to the extent that the facts submitted by the defendants in their additional statement of material facts are properly supported by citations to the summary judgment record, they are deemed admitted. Local Rule 56(e). Since the party opposing a motion for summary judgment may not file a response to the moving party's reply, the attempt by the plaintiffs to add facts for the court's consideration by way
(continued...)

discussed EGPF with plaintiffs Andrews and St. Laurent. Deposition of Michael Cassidy (Volume I) (“First Cassidy Dep.”), filed with the Plaintiffs’ Statement of Material Facts (Docket No. 77) (submitted in connection with a different motion), at 112. Cassidy told them that the type of activity in which EGPF would participate could yield a return in the range of 10 to 100 per cent over a year or so. *Id.* at 116-18. He also told them that the funds they invested in EGPF would be kept in an insured bank account and that “there was bonding available to protect any loss of funds.” Deposition of Michael Cassidy (Volume II) (“Second Cassidy Dep.”), filed with the Plaintiffs’ Statement of Material Facts at 12-13. In response to questions from Andrews in December 1997 Cassidy stated that he had been doing business with Clyde Beverly, manager of EGPF,³ for one and one-half years and that EGPF was an ongoing program. First Cassidy Dep. at 112-13; Second Cassidy Dep. at 162-64. At some point in 1998 Cassidy told Andrews that EGPF would use a guarantee from the Bank of Bangkok to create profits. Second Cassidy Dep. at 75-76, 83-84. As of the first week of May in 1998 Cassidy knew that this deal had not yet occurred and that EGPF had not engaged in any other trades since December 1997. *Id.* at 50.

Shawver is president of defendant CMA, a mortgage banking company licensed and operating in the state of North Carolina. Second Shawver Aff. ¶ 1. In February 1996 CMA adopted a money purchase pension plan, which is apparently known as EGPF. *Id.* ¶¶ 2-4. In April 1996 CMA initiated a common-law trust “to compliment the money purchase pension trust.” *Id.* ¶ 5. An

²(...continued)
of their reply is unfair and inappropriate. The court will not consider any of the facts set forth in the plaintiffs’ “additional statement.”

³ Beverly apparently was not an agent or employee of EGPF. Affidavit of Galen Shawver (“Second Shawver Aff.”) (Docket No. 98) ¶ 8.

account was set up for this trust, in which people began to invest. *Id.* ¶¶ 5-6. Loans on which CMA was listed as the mortgagor were closed for the benefit of EGPF. *Id.* ¶ 6. The plaintiffs entered into contracts drafted by Beverly pursuant to which \$70,000 was transferred from plaintiff St. Laurent to an account held by EGPF at the Centura Bank in North Carolina, \$30,000 from plaintiff Andrews, and \$20,000 from plaintiff Dingwell, all without the knowledge of Shawver. *Id.* ¶¶ 7-9. The contracts stated that the plaintiffs would be subject to a penalty of \$1,000,000 if they contacted Shawver. Second Cassidy Dep. at 119. Shawver first learned of the existence of the plaintiffs on January 17, 1998, two weeks before the bank account was frozen. Second Shawver Aff. ¶ 10. Beverly received \$25,000 from this account in what Shawver characterized as “a scheme whereby [Beverly] convinced [Shawver] that he had invested more money in the [EGPF] than he intended, and . . . wanted that portion of ‘his’ investment back.” *Id.* ¶ 30. Shawver later learned that this was not Beverly’s money “at all.” *Id.* Cassidy told Andrews on several occasions after these initial investments and before he made further investments that his initial investment had been highly profitable on successful trades. Affidavit of David Andrews (“Andrews Aff.”) (Docket No. 29) ¶¶ 6, 13, 14. St. Laurent was provided with written confirmations that EGPF had made trades generating profits for him. Affidavit of Raymond St. Laurent, attached to the plaintiffs’ Memorandum in Support of Motion to Consolidate (“St. Laurent Aff.”) (Docket No. 27), ¶¶ 11-12.

Shawver was a trustee of EGPF. Second Shawver Aff. ¶ 1. Cassidy contacted Shawver in January or February 1998 to determine the whereabouts of Beverly. Second Cassidy Dep. at 17-18. During a conversation that took place on a date between February 15 and February 28, 1998 Shawver told Cassidy that the EGPF account at Centura Bank had been frozen by the state of North Carolina. Deposition of Galen C. Shawver (September 13, 1999) (“Shawver Dep.”), copy submitted with

Plaintiffs' Statement of Material Facts (Docket No. 77), at 76-77 & Exh. 5 thereto (Affidavit of Galen C. Shawver [sic] ("First Shawver Aff.") — Section A), ¶ 12; Second Shawver Aff. ¶ 7. Shawver told Cassidy that there were sufficient funds to cover all claims. Second Cassidy Dep. at 71. Cassidy did not disclose to Andrews or St. Laurent that the Centura Bank account had been frozen at any time prior to an investment of \$187,5000 made by St. Laurent on May 28, 1998, an investment of \$60,000 made by Andrews on February 3, or an investment of \$50,000 made by Andrews on or about May 5, 1998. *Id.* at 71-72, 83-85. Cassidy told Andrews, via e-mail, that Andrews had made significant profits on his investments in EGPF. Second Cassidy Dep. at 159-60.

Cassidy told St. Laurent and Andrews that their investments would earn profits through a substantial guarantee issued by the Bank of Bangkok. First Cassidy Dep at 79-80; Second Cassidy Dep. at 76, 83; St. Laurent Aff. ¶ 24; Andrews Aff. ¶ 26. The amount of \$500,000 was debited from the Centura Bank account to be held in escrow pending authentication of the Bank of Bangkok guarantee. Second Shawver Aff. ¶ 19. These funds were stolen by individuals named Cowan and Brooks. *Id.* Shawver has obtained judgment against them in the amount of \$600,000 in California. *Id.* The stolen funds did not include any funds owned by the plaintiffs. *Id.* ¶ 20.

During January or February 1998 Beverly told Cassidy to direct investments to an account at Bank One in Dallas rather than the Centura Bank account. Second Cassidy Dep. at 27-28. Beverly asked Cassidy to try to persuade Shawver to transfer all of the investments in the Centura Bank account with which Cassidy had been involved to Beverly's accounts in the Bahamas or Austria. *Id.* at 19-20. Cassidy never told the plaintiffs that Beverly was claiming that the funds they had sent to the Centura Bank account belonged to Beverly. *Id.* at 125-26. Cassidy transferred \$410,000 to the Bank One account. *Id.* at 31-32. He learned in March 1998 that those funds had

been taken by Beverly. *Id.* at 32.

Cassidy later directed investors to wire funds to a bank account of Ronald Tanet. *Id.* at 37-40. Tanet was a criminal lawyer representing Shawver. *Id.* at 39-40; Plaintiffs' SMF ¶ 53; Defendant's Responsive SMF ¶ 53. The amount transferred to Tanet's account was approximately \$340,000. *Id.* at 41-42. These funds were subsequently transferred to an account maintained by Cassidy under the name of defendant Shuku International in New Hampshire. *Id.* at 42-43. The funds from this account were later wired at Cassidy's direction to an account at First Tennessee Bank. *Id.* at 45. St. Laurent wired \$187,500 into this account. Deposition of Jerry Revalee ("Revalee Dep.") at 59-60. Andrews wired \$50,000 into this account. *Id.* at 60-61. The funds in the Tennessee bank account were used by defendant Jerry Revalee and others for personal expenditures, including the purchase of vehicles for personal use. Second Cassidy Dep. at 61-62. Revalee paid \$35,000 from this account to Linda Shawver, wife of defendant Shawver, Revalee Dep. at 66, as reimbursement to Shawver for money he had spent "defending the corpus of the trust fund and monies wrongfully seized in the Centura Bank account by the State of North Carolina and subsequently by the United States government," Second Shawver Aff. ¶ 26. A check from this account in the amount of \$174,000 was used to settle a dispute between the Money Store and the Receiver of the Centura Bank account. *Id.* ¶ 29.

III. Discussion

A. Fraud (Count VII)⁴

Under Maine law,

[i]n order to prevail on a claim of fraud, a plaintiff must show that a person:

(1) makes a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act or to refrain from acting in reliance on it, and (5) the other person justifiably relies on the representation as true and acts upon it to the damage of the plaintiff.

McCarthy v. U.S.I. Corp., 678 A.2d 48, 53 (Me. 1996) (quoting *Fitzgerald v. Gamester*, 658 A.2d 1065, 1069 (Me. 1995)). Each of these elements must be proved by clear and convincing evidence. *Wildes v. Ocean Nat'l Bank of Kennebunk*, 498 A.2d 601, 602 (Me. 1985). The plaintiffs correctly point out that both omissions and affirmative misrepresentations are actionable under Maine law. *Reed Paper Co. v. Procter & Gamble Distrib. Co.*, 807 F.Supp. 840, 844 (D. Me. 1992). However, they make no argument in support of their claims against defendant EGPF for fraud. Plaintiffs' Memorandum at 8-17. Accordingly, their motion for summary judgment against EGPF on Count VII must be denied.⁵

⁴ The plaintiffs begin by arguing that defendant EGPF has a contractual obligation to pay them certain amounts and that they are entitled to summary judgment on that basis. Memorandum of Law in Support of Motion for Partial Summary Judgment, etc. ("Plaintiffs' Memorandum"), attached to Motion, at 8. The only claims asserted against EGPF in the third amended complaint addressed by their motion are for fraud and misrepresentation, to which this argument is irrelevant.

⁵ In their reply memorandum, the plaintiffs contend in conclusory fashion that EGPF and CMA are liable for fraud "given that [Shawver] controlled" them. Plaintiffs' Reply at 2. Even in the unlikely event that such an argument would be sufficient to establish liability on the part of these corporate entities, as discussed *infra* the summary judgment record does not include evidence (continued...)

The plaintiffs have failed to include in their statement of material facts any evidence that any false representation was made to them by CMA. Indeed, they make no argument concerning CMA's liability for fraud beyond a statement referring to "the clear fraudulent conduct of Shawver and Commercial Mortgage." Plaintiffs' Memorandum at 17. Summary judgment against a party requires considerably more. The motion for summary judgment against CMA on Count VII must be denied.

With respect to Shawver, the plaintiffs' motion for summary judgment on Count VII depends upon factual assertions that either are not supported by citations to the summary judgment record or are directly disputed by Shawver. They have submitted no evidence of false representations made by Shawver before Dingwell's investment or before the initial investments of St. Laurent and Andrews. They make no statement concerning any attempts by St. Laurent or Andrews to retrieve the funds they invested after Shawver had informed Cassidy that the Centura Bank account was frozen, and their factual assertions concerning Shawver's interest in the Tennessee bank are directly contradicted by Shawver. Second Shawver Aff. ¶ 17. They submit no evidence concerning the Dallas bank account that relates to Shawver. They argue that Shawver is liable to them for fraud because he did not tell them after learning that Cassidy had sent their money to the Centura Bank account that their money was at risk, that they should not expect the rate of return mentioned by Cassidy, or that their funds had been stolen. Plaintiffs' Memorandum at 16. The assertion that the plaintiffs' money had been stolen is directly disputed by Shawver, and the plaintiffs offer no evidence that they relied on Shawver's alleged omissions in any way when making their subsequent

⁵(...continued)
sufficient to allow a court to grant summary judgment for the plaintiffs against Shawver on the fraud count. Even if the argument had not been waived by the plaintiffs' failure to mention it in their initial memorandum, therefore, they are not entitled to summary judgment on this basis.

investments. Finally, the plaintiffs argue that Shawver should be liable “for the fraudulent inducements and fraudulent misrepresentations that were made by Shawver to Beverly, and then repeated to Cassidy, and then repeated to investors . . . regarding the Fund being an ERISA qualified, secure investment fund that would provide substantial returns.” *Id.* at 17. However, the plaintiffs’ statement of material facts provides no support for the initial assertion in this alleged chain of liability; there are no alleged statements made by Shawver to Beverly.

The plaintiffs are not entitled to summary judgment against defendant Shawver on Count VII.

B. Counts VIII and IX

The plaintiffs also fail to offer in their initial or reply memoranda any argument in support of their motion for summary judgment against defendant EGPF on Counts VIII (misrepresentation) and IX (fraud as to defendant Andrews). They are accordingly not entitled to summary judgment on those counts.⁶ *United States v. Slade*, 980 F.2d 27, 30-31 (1st Cir. 1992).

C. Count XVI (Breach of Fiduciary Duty)

The plaintiffs contend that defendants Shawver and CMA violated a fiduciary duty running to them. This duty arose, they assert, because CMA was the trustee of EGPF and Shawver “held himself out to investors . . . as the trustee of” EGPF. Plaintiffs’ Memorandum at 12. However, the plaintiffs fail to include in their statement of material facts any allegation that CMA was a trustee of EGPF. They allege that “Shawver has acknowledged to all investors, including Plaintiffs, that he

⁶ The plaintiffs do argue in their reply memorandum that they are entitled to summary judgment against EGPF on their claim of violation of the Maine Revised Securities Act, Count XVII, Plaintiffs’ Reply at 2, 4-5, but their motion does not seek summary judgment against EGPF on this count. In addition, arguments or issues raised for the first time in reply memoranda will not be considered by this court. *Grant v. News Group Boston, Inc.*, 55 F.3d 1, 7 (1st Cir. 1995).

acts as a fiduciary on behalf of Commercial Mortgage,” Plaintiffs’ SMF ¶ 109,⁷ but that does not establish that CMA was a trustee of EGPF. Indeed, the exhibit cited in support of that paragraph is a letter written on CMA’s letterhead in which Shawver refers to himself as “acting Fiduciary on behalf of Commercial Mortgage & Associates Inc. (Your custodial Bank).” Letter dated September 4, 1996 from Galen Clifton Shawver to Participants\Investors, Exh. K to Plaintiffs’ SMF, at [1]. The letter does not establish that CMA had a fiduciary relationship with any person or thing and certainly not that it is or as a trustee of EGPF.

On the other hand, Shawver states that he is “trustee of Emerald Green Pension Fund (“EGPF”).” Second Shawver Aff. ¶ 1. There is no evidence in the summary judgment record submitted by the plaintiffs that Shawver ever “held himself out” to any plaintiff as such, but that is not the issue. If the plaintiffs could establish that they invested in EGPF, then Shawver as trustee could have a fiduciary duty running to them. *See generally Bryan R. v. Watchtower Bible & Tract Soc. of New York, Inc.*, 738 A.2d 839, 846 (Me. 1999) (describing salient elements of a fiduciary relationship). The evidence as to whether the plaintiffs ever invested in EGPF is very much in dispute. Second Shawver Aff. ¶ 11; Answer of Defendant Michael Cassidy to Plaintiffs’ Interrogatories, part of Exh. A to Plaintiffs’ SMF, ¶¶ 4, 14-16, 20-21.⁸ In addition, none of the

⁷ The defendants do not admit or deny this allegation in their responsive statement of material facts, and their purported qualification lacks any citation to the record. Defendants’ Responsive SMF ¶ 109.

⁸ The plaintiffs have attached to their statement of material facts as Exhibit I two “guarantee payorders” purporting to be issued by EGPF, one of which is payable to ShuKu International “for the credit to Raymond St. Laurent,” and the other to ShuKu International “for the credit to AMAZIAH Global,” an entity not mentioned in the plaintiffs’ statement of material facts, and as Exhibit D several documents entitled “Emerald Green Pension Fund Investment Transactional Account,” bearing the names of the plaintiffs and signed, if at all, only by the plaintiffs. The only
(continued...)

representations on the basis of which the plaintiffs seek to establish Shawver's liability on this count were made to them by Shawver; they were made, according to the plaintiffs' statement of material facts, by Cassidy. The plaintiffs' statement of material facts fails to support any inference that Cassidy was acting for Shawver or under his control; indeed, the only evidence in the summary judgment record is to the contrary. *Id.* ¶¶ 12-13. Finally, the plaintiffs base their argument for summary judgment on this count on the alleged fraud of the defendants; as discussed above, the plaintiffs are not entitled to summary judgment on their claim of fraud, and the material evidence is still very much in dispute on that issue.

For all of these reasons, the plaintiffs are not entitled to summary judgment against Shawver and CMA on Count XVI.

D. Count XVII (State Securities Statute)

The plaintiffs contend that they are entitled to summary judgment against Shawver and CMA on Count XVII, which alleges violations of the Revised Maine Securities Act, 32 M.R.S.A. § 10101 *et seq.* The Act provides, in relevant part:

In connection with the offer, sale or purchase of any security, a person shall not, directly or indirectly:

1. Fraud. Employ any device, scheme or artifice to defraud;

⁸(...continued)
allegation concerning the source of Exhibit D in the plaintiffs' statement of material facts is that these statements were provided to the plaintiffs by Cassidy. Plaintiffs' SMF ¶¶ 73, 77. The only allegation concerning Exhibit I is that the "debt owed by the Fund to St. Laurent and Andrews is evidenced by" these documents. *Id.* ¶ 97. There are no allegations that the plaintiffs actually invested in EGPF, as opposed to "participating in investments related to" EGPF, *id.* ¶ 6, but only allegations, properly controverted by these defendants, that they were told by Cassidy to send money to EGPF's Centura Bank account and a Tennessee bank account alleged to be that of EGPF, *id.* ¶¶ 14-15, 18-19, 21, and that Cassidy subsequently informed them that their investments had been profitable, *id.* ¶¶ 73-77, 86, 90.

2. Untrue statements, material omissions. Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or

3. Deceptive practices. Engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

32 M.R.S.A. § 10201. The plaintiffs base their claim against Shawver and CMA on 32 M.R.S.A.

§ 10605(1) and (3). Plaintiffs' Memorandum at 9. Those statutory sections provide:

1. Offer or sale of security. Any person who offers or sells a security in violation of section 10201 . . . is liable to the person purchasing the security from that person. The person purchasing the security may sue to recover the consideration paid for the security, together with interest at the legal rate from the date of payment, costs and reasonable attorneys' fees less the amount of any income received on the security, upon the tender of the security, or for damages plus costs and reasonable attorneys' fees if the person no longer owns the security.

* * *

3. Control persons. Every person who directly or indirectly controls another person liable under subsection 1 or 2, every partner, officer or director of that other person, every person occupying a similar status or performing similar functions, every employee of that other person who materially aids in the act or transaction constituting the violation and every broker-dealer or sales representative who materially aids in the act or transaction constituting the violation is also liable jointly and severally with and to the same extent as that other person, unless the person otherwise secondarily liable under this Act proves that the person did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

32 M.R.S.A. § 10605(1) & (3). The factual basis for the plaintiffs' contention that they are entitled to summary judgment on this claim is that (i) Shawver failed to return their money or warn them of "the formidable risks associated with the Fund" after he became aware that Cassidy was causing their money to be wired to the EGPF Centura Bank account, (ii) Shawver thereafter "worked with Cassidy to direct the funds of investors" to Tanet's bank account, (iii) Shawver "participated in directing over

\$1.1 million in investor funds for the Fund to the First Tennessee Bank account in connection with Jerry Revalee,” (iv) Shawver never directed Cassidy to stop soliciting investments in the Fund, (v) Shawver used “the investment funds” for his own purposes, (vi) Shawver failed to disclose to “new investors” that the Centura Bank account was frozen or that the funds were not held in blocked or escrowed accounts, (vii) Shawver released to Brooks and Cowen \$500,000 from the Centura Bank account in connection with the Bank of Bangkok guarantee that was lost, and (viii) Shawver “allowed Cassidy” to provide false statements of account to the plaintiffs. Plaintiffs’ Memorandum at 9-11. The only argument supplied by the plaintiffs in support of this claim against CMA is that it “was the signatory on the bogus Guaranty [sic] Pay Orders,” and that Shawver “used [CMA] throughout the transactions to create the appearance that investors were dealing with a legitimate commercial bank.” *Id.* at 12.

Neither of the latter allegations supports a cause of action against CMA under the language of section 10605. The allegations, even if true, are not evidence that CMA offered or sold a security to the plaintiffs. The plaintiffs offer no evidence that CMA directly or indirectly controlled Shawver or was itself a broker-dealer or sales representative as those terms are defined in 32 M.R.S.A. § 10501, the only apparent bases for a recovery by the plaintiffs against CMA under section 10605(3). The plaintiffs are not entitled to summary judgment against CMA on Count XVII.

With respect to Shawver, the listed factual allegations upon which the plaintiffs base their motion are unsupported by their statement of material facts, have been properly disputed by the defendants, or simply do not establish that Shawver offered or sold a security to the plaintiffs. Thus, the first allegation, that Shawver did not return the plaintiffs’ money or warn them of the risks associated with EGPF after becoming aware that Cassidy had directed them to put their money into

EGPF's pension fund, cannot be construed as the offering or sale of a security. The second allegation, that Shawver thereafter worked with Cassidy to direct the plaintiffs' funds to Tanet's bank account, is unsupported by any allegation in the plaintiffs' statement of material facts and would not, in any event, constitute the sale or offering of a security. The third allegation, that Shawver directed investor funds "for EGPF" to the First Tennessee Bank account, is properly denied by the defendants, Defendants' Responsive SMF ¶¶ 56, 98-100, and in any event would not constitute evidence that Shawver sold a security to the defendants or offered one for sale.

The fourth allegation, that Shawver never directed Cassidy to stop soliciting investments in EGPF, apparently rests on an assumption that Shawver would thereafter be deemed as a matter of law to have participated in any sale of EGPF securities by Cassidy, but this allegation is unsupported by any entry in the plaintiffs' statement of material facts, and Shawver has denied that Cassidy was his agent. Second Shawver Aff. ¶ 12. The fifth allegation, that Shawver used the investment funds for his own purposes, cannot be construed to constitute the sale or offering for sale of a security. The sixth allegation, that Shawver failed to disclose that the Centura Bank account was frozen or that the plaintiffs' funds were not held in blocked or escrow accounts, is similarly unsupported by the plaintiffs' statement of material facts; indeed, the statement of material facts does not include any suggestion that Shawver even knew that the plaintiffs had been told that their money would be placed in such accounts.

The seventh allegation, that Shawver released \$500,000 from the Centura Bank account cannot possibly be construed to constitute the sale or offering for sale of a security. The eighth allegation, that Shawver allowed Cassidy to provide false statements of account to the plaintiff, is not supported by any entry the plaintiffs' statement of material facts and would not, in any event,

constitute the sale or offering for sale of a security.

Finally, the plaintiffs have not provided any evidence that they tendered the securities at issue, which they do not identify, or that they no longer own the securities, a necessary element of a claim under section 10605. This omission makes it unnecessary to consider the defendants' argument, to which the plaintiffs devote much of their reply memorandum, that no security was sold to the plaintiffs.

The plaintiffs are not entitled to summary judgment against Shawver on Count XVII.

IV. Conclusion

For the foregoing reasons, I recommend that the plaintiffs' motion for partial summary judgment against defendant Emerald Green Pension Fund on Counts VII, VIII and IX and against defendants Galen C. Shawver and Commercial Mortgage & Associates, Inc. on Counts VII, XVI and XVII be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 26th day of January, 2000.

*David M. Cohen
United States Magistrate Judge*

